IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE DAVID Y. MERRITT, Debtor/ Appellant. UNITED STATES OF AMERICA, Plaintiff/ Appellee, v. DAVID Y. MERRITT, Defendant/ Third-Party Plaintiff/ Appellant, v. MICHAEL B. COOKSEY, et al., Third-Party Defendants/ Appellees.	)	No. 95-CV-4228-JPG (BK 94-40855) (ADV 95-4009)

MEMORANDUM AND ORDER

GILBERT, Chief Judge:

Pending before the Court is a notice of appeal [Doc. 61] filed by debtor David Y. Merritt ("Merritt") that the Court will construe, for reasons that will follow, as a motion to proceed *in forma pauperis* on appeal to this Court. Merritt makes five arguments on appeal: (1) that the Bankruptcy Judge erred in finding that $47.25 of his debts were non-dischargeable; (2) that the Bankruptcy Judge erred in not sanctioning government officials for freezing his commissary account while the automatic stay was in force; (3) that the Bankruptcy Judge erred in not allowing Merritt

to remove his handcuffs during the adversary proceeding; (4) that the Bankruptcy Judge erred by not providing Merritt with an attorney; and (5) the Bankruptcy Judge erred in not protecting Merritt from an assault that occurred in USP-Marion.

Merritt is an inmate at USP-Marion.[1] During his incarceration, he became indebted to the United States for $2,675 in charges largely resulting from his need for photocopying and postage to pursue at least eight civil actions filed since August 1989. Included in this amount were penalties imposed by prison officials for destroying a bed sheet ($6.90), for destroying a typewriter ribbon ($5.25), and for making a radio unfit for use ($42.00). The United States filed a complaint seeking a determination that these debts were nondischargeable as penalties under 11 U.S.C. § 523(a)(7). Subsequently, prison officials placed a freeze on Merritt's commissary account in the amount of the penalties.

Merritt filed a counter-complaint asserting that the alleged penalties were "false" and illegally imposed as a result of "baseless allegations" and were, in any event, dischargeable under Section 523(a)(7). Also, Merritt filed a third-party complaint against various prison officials, seeking sanctions for actions allegedly taken in violation of the automatic stay and in retaliation for his bankruptcy filing, including the freezing of his commissary account.

At the trial held on May 11, 1995, the United States conceded that the $6.90 penalty for destruction of the bed sheet was dischargeable

[1]The facts are taken from Bankruptcy Judge Meyers' September 8, 1995, opinion.

under 11 U.S.C. § 523(a)(7)(B) because it was imposed more than three years prior to the bankruptcy filing. After hearing evidence from all parties, the bankruptcy judge concluded that the $47.25 owed for destroying the typewriter ribbon and altering the radio were nondischargeable as penalties pursuant to Section 523(a)(7). The bankruptcy judge ordered that the complaint to determine the dischargeability of the debt was granted in part and denied in part. Furthermore, the Court ordered that the amended third-party complaint for sanctions was denied.

Before resolving the motion to proceed *in forma pauperis*, the Court must examine its subject matter jurisdiction over this appeal. This Court has jurisdiction to hear appeals from final judgments, orders, and decrees of the bankruptcy court under 28 U.S.C. § 158(a)(1). The definition of finality in a bankruptcy appeal taken under Section 158 is much more flexible than in an ordinary civil appeal. In re Gould, 977 F.2d 1038, 1040-41 (7th Cir. 1992). "A final order in a bankruptcy case [] is one that resolves all contested issues on the merits and leaves only the distribution of the estate assets to be completed." In re Wade, 991 F.2d 402, 406 (7th Cir. 1993). "Several types of bankruptcy orders are appealable, for example, orders allowing or denying claims; orders denying relief from a stay; decisions involving property ownership; exemptions; ..." Id. at 406 (citation omitted).

The bankruptcy court's May 11, 1995, order granting dischargeability in part and denying it in part, as well as the order denying sanctions, resolved all pending claims in the bankruptcy. As

such, it may be construed as a final order allowing an appeal.

Bankruptcy Rule 8002(a) provides that "notice of appeal shall he filed with the clerk of the bankruptcy court within 10 days of the date of the entry of judgment, order, or decree appealed from." Failure to timely file a notice within the ten-day appeal period divests the district court of jurisdiction to hear the appeal and mandates dismissal of the appeal. In re Weston, 18 F.3d 860, 862-63 (10th Cir. 1994); Martin v. Bay State Milling Co., 151 B.R. 154, 155 (N.D. Ill. 1993)(collecting cases). "Judgment" means any appealable order under Bankruptcy Rule 9001, and "any order appealable to the appellate court" under Bankruptcy Rule 9002.

Bankruptcy Rule 9021 adopts the "separate document" requirement of Federal Rule of Civil Procedure 58. Bankruptcy Rule 9021 provides:

> Except as otherwise provided herein, Rule 58 F.R.Civ.P. applies in cases under the Code. Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. A judgment is effective when entered as provided in Rule 5003. The reference in Rule 58 F.R.Civ.P. to Rule 79(a) F.R.Civ.P. shall be read as reference to Rule 5003 of these rules.[2]

Thus, an "order" in the bankruptcy court is appealable as a "judgment" if it is set forth in a document separate from the opinion. In re

---

[2]Bankruptcy Rule 5003, setting forth the procedure for entry of judgments in the bankruptcy docket, provides:

> (a) The clerk shall keep a docket in each case under the Code and shall enter thereon each judgment, order, and activity, in that case as prescribed by the Director of the Administrative Office of the United States Courts. The entry of a judgment or order in a docket shall show the date the entry is made.

Behrens, 900 F.2d 97 (7th Cir. 1990); In re Kilgus, 811 F.2d 1112 (7th Cir. 1987); Stepflug v. Federal Land Bank of St. Paul, 790 F.2d 47 (7th Cir. 1986). Moreover, "the judgment must be self-contained and complete, setting forth the disposition and the relief to which the prevailing party is entitled; and, since the judgment is not an opinion, it should not contain any legal reasoning." In re Behrens, 900 F.2d at 99 (citing Reyblatt v. Denton, 812 F.2d 1042 (7th Cir. 1987)).

The catch in this case is that the bankruptcy court's order was given orally in open court. The only "separate document" entered which records that order is the minute entry of May 11, 1995.[3] (DOC. 49.) It might be argued that this minute entry qualifies as a final order. However, there is a problem with that argument. At the bottom of the minute entry there is a notation stating: "These written minutes are a clerical entry of the court proceedings for record keeping purposes only. They are not and should not be considered as the order of the court, which was orally delivered. Consult the transcript of

---

[3]The entry on the docket itself does not meet the separate document requirement.

> 'Entry' has a well defined meaning under the rules; it occurs only when the essentials of a judgment or order are set forth in a written document separate from the court's opinion or memorandum *and* when the substance of this separate document is reflected in an appropriate notation on the docket sheet assigned to the action.

Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683, 688 (4th Cir. 1978), *quoted with approval in* Stepflug v. Federal Land Bank of St. Paul, 790 F. 2d 47, 49 (7th Cir. 1986).

proceedings for the actual order."

The policy underlying the separate document requirement is to provide certainty as to when the time period within which to appeal begins. United States v. Indrelunas, 411 U.S. 216 (1973); *accord* In re Behrens, 900 F.2d at 99 (observing that failure to enter a self-contained and complete judgment "causes uncertainty about the running of the time to appeal, and about whether the bankruptcy court's judgment was really final.)" Here, the only written document containing the bankruptcy court's order is the minute entry that states that it is not to be considered an order. Under these circumstances, the Court concludes that there is no separate document as required by Bankruptcy Rule 9021.[4]

Nevertheless, the separate document requirement can be waived if the bankruptcy court intended to treat the order as final and none of the parties objects to the absence of a separate document. In re Behrens, 900 F.2d at 100 (citing C.I.T. Financial Serv. v. Yeomans, 710 F.2d 416 (7th Cir. 1983)); *accord* In re Schulz Mfg. Fabricating Co., 956 F.2d 686, 688 n.1 (7th Cir. 1992). There is no doubt that the bankruptcy court intended to treat the oral order as final. Furthermore, none of the parties has objected to the absence of a separate document, although the court notes that the parties other than the debtor have not had an opportunity to address the issue in this

[4]In the future, the bankruptcy court should ensure that a final order complies with the separate document requirement. This will avoid a lengthy analysis of jurisdiction in the district court and will ensure that the time to appeal will run rather than giving disappointed litigants a chance to appeal years later because a separate document was not filed.

Court. Rather than wait to see if one of the parties makes an objection in a brief on the merits, the Court finds that it will expedite matters to proceed under the assumption that none of the parties will object. However, this presumption will in no way constitute a waiver of the parties' right to object at a later time.

Unfortunately, the resolution of the separate document inquiry does not end the Court's examination of its subject matter jurisdiction. The Clerk of the bankruptcy court has noted that Merritt's notice of appeal from the denial of leave to proceed *in forma pauperis* on appeal was filed on the 11th day after the order denying leave to proceed *in forma pauperis* on appeal was denied by the bankruptcy court. Bankruptcy Rule 8002(a) provides that the time for appeal from a final order in bankruptcy is ten days. Bankruptcy Rule 9006(a) provides that the day of the act or event from which the designated period begins to run is not included in the computation. Furthermore, the rule states that intermediate Saturdays, Sundays, and legal holidays are excluded from the calculation if the time period prescribed is less than eight days. However, since the time period for appeal is ten days, intermediate Saturdays, Sundays, and legal holidays are included. Thus, the notice of appeal from the September 8, 1995, order denying leave needed to be filed no later than September 18, 1995. Instead, it was filed on September 19, 1995, seemingly making it untimely.[5]

---

[5]The Court says seemingly because it is an open question in the Seventh Circuit whether a prisoner filing may be deemed filed in the bankruptcy context when it is delivered to prison authorities for mailing rather than when it is received by the bankruptcy court. The

Nevertheless, this Court finds that the appropriate notice of appeal to consider is the notice of appeal from the oral order of the bankruptcy court on the underlying issues. That order was issued May 11, 1995. Merritt filed his notice of appeal on May 19, 1995, well within the ten day period for appeal. The bankruptcy court chose to treat its decision regarding leave to proceed as a separate final order needing a separate notice of appeal. Based on this, the bankruptcy court granted Merritt leave to appeal the denial of leave. This Court believes that the proper (and simpler) course of action would be to allow a party denied leave to appeal *in forma pauperis* by the bankruptcy court the opportunity to file a motion in the district court asking for leave to appeal *in forma pauperis*. This is the way that *in forma pauperis* motion are treated in the ordinary civil context, and the Court sees no reason to force litigants to file two notices of appeal rather than treating the *in forma pauperis* issue as a motion rather than an appeal. Thus, the Court will treat the notice of appeal as timely, and will construe the notice of appeal of the denial of leave to appeal *in forma pauperis* as a motion to allow leave to proceed

---

Supreme Court has held that a notice of appeal by a *pro se* inmate is deemed filed when it is delivered to prison authorities for mailing. Houston v. Lack, 487 U.S. 266, 270-72 (1988); see also Thomas v. Gish, 64 F.3d 323 (7th Cir. 1995) (applying Houston rule in civil rights case). This holding was later codified in Fed. R. App. P. 4(c). Although there is no rule similar to Fed. R. App. P. 4(c) in the bankruptcy rules, at least one court of appeals has concluded that the Houston rule applies in the bankruptcy context. See In re Flanagan, 999 F.2d 753, 757-58 (3rd Cir. 1993) (holding that Houston's rationale applies with equal or greater weight in the bankruptcy context). This Court need not decide this issue today because its decision that the notice of appeal was timely rests on other grounds.

in forma pauperis.[6]

Prior to October 1, 1994, a debtor could not proceed *in forma pauperis* in a bankruptcy case. See United States v. Kras, 409 U.S. 434, 446 (1973) (holding that there is no constitutional or statutory right to proceed *in forma pauperis* in bankruptcy cases). However, on that date, this district, along with five others, implemented a pilot program authorized by Congress that allows litigants to proceed *in forma pauperis* in bankruptcy cases. The statute authorizing the program states, in pertinent part, that "fees payable under section 1930 of title 28, United States Code, may be waived in cases under chapter 7 of title 11, United States Code, for debtors who are individuals unable to pay such fees in installments." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-121, § 111(d)(3), 107 Stat. 1153, 1165 (1993) (hereafter "Act"). Other than the use of the permissive "may" rather than the mandatory "shall", indicating that the fact that the Court need not grant a motion to proceed *in forma pauperis* merely because the debtor cannot pay the fees, the Act

[6]This procedure should only be followed when a litigant requests leave to proceed *in forma pauperis* on appeal. If the bankruptcy court denies leave to proceed *in forma pauperis* after reviewing the initial fee waiver application, then the bankruptcy court should enter a separate document stating that the bankruptcy court is denying leave to proceed without prepayment of costs, and the litigant may file a notice of appeal from that decision. If the litigant then moves for leave to proceed *in forma pauperis* on appeal, the bankruptcy court should issue a written order, and if that order denies the motion, the litigant should file a motion in the district court rather than filing a second notice of appeal.

provides no hint of the standard to be used in evaluating a motion to proceed *in forma pauperis*.

A subcommittee of the Judicial Conference of the United States has issued "Guidelines for Processing Fee Waiver Applications and the Underlying Chapter 7 Cases in the Six Pilot Courts" (hereafter "Guidelines"). In the Guidelines, the subcommittee states:

> If the debtor files a notice of appeal arising out of an order denying the fee waiver application and also files a request to proceed with the appeal without prepayment of the $105.00 fee (see items (9) and (16) of the Judicial Conference Bankruptcy Court Miscellaneous Fee Schedule), such requests should he treated and administered like similar requests under 28 U.S.C. § 1915.

However, this statement outlines the procedure to be followed when the fee waiver application is denied at the outset, and does not address the standard to be applied when the bankruptcy court grants the fee waiver, rules on the debtor's case on the merits (including in this case an adversary proceeding), and then the debtor seeks to proceed on appeal *in forma pauperis*.

The bankruptcy court noted this distinction and engaged in a thorough analysis of the policy concerns underlying various standard articulated by courts in applying Section 1915. After noting that there is no case law discussing the appropriate standard to be applied in the present context, the bankruptcy court reasoned that a bankruptcy proceeding, unlike a criminal, habeas corpus, or civil rights case, in a matter of economics and social welfare rather than implicating issues involving deprivations of constitutional rights. In this context, the

bankruptcy court stressed that it is appropriate to impose a higher standard due to the lesser importance of the issues involved and because the nonpaying litigant has no disincentive to sue. Thus, the bankruptcy court concluded that it would apply a "reasonable likelihood of success" standard in evaluating a motion for leave to appeal *in forma pauperis*.

This Court agrees with the bankruptcy court that a heightened standard is appropriate. As the bankruptcy court stated, a bankruptcy case does not involve fundamental rights. In addition, without the imposition of a heightened standard, district courts will likely be faced with resolving an appeal in every case involving an *in forma pauperis* proceeding because the debtor has no economic disincentive to sue. This prediction is borne out by the number of frivolous cases filed each year in district courts around the country by prisoners desiring to proceed *in forma pauperis*.

The Court does not feel that imposing a heightened standard conflicts with the application of Section 1915 in ordinary civil cases. Under Section 1915, leave to proceed *in forma pauperis* can be denied only if the complaint lacks an arguable basis in law or fact. Neitzke v. Williams, 490 U.S. 319, 328 (1989). However, this situation is not controlled, but only informed, by the standard applied in a case where Section 1915 applies. Neither the Act nor the Guidelines provide a standard to be applied in the instant case, and thus it is not enough to say that a heightened standard is inappropriate merely because it differs from the standard applied in cases in which Section 1915 applies. This standard only applies when the debtor has already

received a decision on the merits by the bankruptcy court. Unlike the situation where denial of leave will prevent a litigant from receiving any judicial review on the merits, this situation is more akin to an application for a certificate of probable cause in a habeas corpus case. In both situations, the litigant receives a review on the merits by the lower court, and the standards applied in making the determination whether to grant a certificate of probable cause ensures that the reviewing court will not be overwhelmed by appeals in cases of dubious merit. See Stuart v. Gagnon, 837 F.2d 289, 291 (7th Cir. 1987) (holding that the factors to be considered in determining whether a certificate should issue include: (1) the nature of the right involved; (2) the likelihood of success on the merits; (3) whether the issues involved are debatable among jurists; (4) whether a court could decide the issues involved differently; and (5) whether the questions deserve further proceedings). Thus, this is not a situation where a heightened standard will prevent the debtor from receiving relief in bankruptcy. Rather, it is a tool to ensure that scarce judicial resources are not expended on appeals where the resolution on the merits in the bankruptcy cannot seriously be questioned. Therefore, the Court holds that the bankruptcy court was correct in imposing a heightened standard based on the reasonable likelihood of success on the merits.[7]

[7]The Court notes that the reasonable likelihood of success standard does not require a litigant to show that it is more likely than not that the reviewing court will hold in his or her favor. Rather, the litigant need only show a reasonable possibility that the reviewing court might hold in his or her favor.

After applying this standard to Merritt's issues on appeal, the Court is convinced that he does not have a reasonable likelihood of success on the merits. As to Merritt's first argument, the bankruptcy court found that the $47.25 was nondischargeable as a penalty, and it is extremely improbable that this Court would find that the decision of the bankruptcy court is clearly erroneous. Merritt's second argument regarding the freeze on his commissary account was his strongest ground for appeal until the Supreme Court definitively decided that a freeze does not constitute a set off that violates an automatic stay. See Citizens Bank of Maryland v. Strumpf, No. 94-1340, 1995 WL 633458 at *2 (U.S. Oct. 31, 1995) (a freeze on a bank account is not a setoff under 11 U.S.C. § 362(a)(7)). Thus, the bankruptcy court was correct to deny sanctions based on the freeze since the freeze did not violate the automatic stay. As to Merritt's third argument, he has made no showing that being handcuffed affected the resolution of the underlying litigation in any way. As to his fourth argument, Merritt has no right to counsel in a bankruptcy case, he has not shown what counsel could have done that would have resulted in a more favorable ruling to him, and it is extremely improbable that this Court would find the bankruptcy court's denial of counsel to be clearly erroneous. Finally, Merritt's argument regarding the alleged assault is irrelevant since it occurred after the final decision in this case and is an attempt to bootstrap an unrelated civil suit to the bankruptcy proceeding.

For the reasons stated, the notice of appeal [Doc. 61], construed by the court as a motion for leave to appeal *in forma pauperis*, is **DENIED**. Merritt is given through November 27, 1995, to pay the $105

docketing fee to the bankruptcy court. Failure to make timely payment will result in the dismissal of this appeal.

IT IS SO ORDERED.

DATED: November 13, 1995

/s/ J. PHIL GILBERT
CHIEF JUDGE